

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-513964-D1
Issued to: Theodore L. LEVY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2148

Theodore L. LEVY

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 9 December 1977, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman's documents for three months, plus six months on twelve months' probation, upon finding him guilty of misconduct. The specification found proved alleges that while serving as Boatswain on board the United States S.S. EAGLE LEADER under authority of the document above captioned, on or about 10 October 1977, while said vessel was at sea, Appellant did wrongfully assault and batter James McDuff, a member of the crew.

The hearing was held at Corpus Christi, Texas, in two sessions: the first on 25 October 1977; and the second on 7 November 1977.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of four witnesses (including the alleged victim) as well as several documentary exhibits. In defense, Appellant offered in evidence his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered a written order suspending all documents issued to Appellant for a period of three months plus six months on twelve months' probation.

The entire decision was served on 9 December 1977. Appeal was timely filed on 5 January 1978 and perfected on 17 July 1978.

FINDINGS OF FACT

On 10 October 1977, Appellant was serving as Boatswain on

board the United States S.S. EAGLE LEADER and acting under authority of his document while the vessel was at sea.

James McDuff was a member of the crew of EAGLE LEADER and was serving aboard that vessel in the capacity of galley utilityman on 10 October 1977.

One of McDuff's duties as galley utilityman was to dispose of the ship's garbage. When EAGLE LEADER was at sea, McDuff would occasionally dispose of the garbage by throwing it overboard. Sometimes, apparently because of McDuff's failure to position himself correctly, some of the tossed garbage would land on the decks instead of going over the side.

One of Appellant's responsibilities as boatswain aboard EAGLE LEADER was to ensure that the ship's decks were properly maintained and kept clean. Appellant had more than once admonished McDuff for carelessly littering the decks with garbage. McDuff's reaction to these admonitions was to call out to a fellow crewmember, whenever he (McDuff) was carrying the garbage out, and state in aloud voice, "I'm taking the garbage out." These statements were always made so that Appellant could hear them, for the obvious purpose of annoying and irritating Appellant. The relationship between Appellant and McDuff was somewhat less than cordial.

On 10 October 1977 at about 1630, while EAGLE LEADER was at sea, McDuff was taking the garbage out. On his way aft McDuff stopped at the recreation room, where Appellant and several others were seated, and made his usual loud comment about "taking the garbage out."

As McDuff was returning from the aft section of the ship, Appellant got up from his chair, left the recreation room, and confronted McDuff in the passageway. No crewmember in the recreation room could see what happened between Appellant and McDuff in the passageway, but loud voices were heard.

Shortly thereafter, Appellant returned to the recreation room, with McDuff following "close behind". Appellant turned and grabbed McDuff by the lapels of his jacket, shook him, and yelled at him. While Appellant was holding him, McDuff "almost fell over a chair and banged his head a couple of times against the ship's bulkhead." Once Appellant released him, McDuff went to the galley and later reported the incident to the Master.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that Appellant was denied a

fair hearing and due process of law; and that the decision of the Administrative Law Judge was contrary to the evidence.

APPEARANCE: James T. Smith, Esq., Corpus Christi, Texas.

OPINION

Appellant's claim of unfairness stems from the fact that the Master of EAGLE LEADER was not compelled to appear as a witness at the first hearing session.

When Appellant was served with the charges and specification, he requested that the Master of EAGLE LEADER be subpoenaed as a witness at the upcoming hearing. At the time Appellant made this request, the Investigating Officer knew that the Master was not a witness to the alleged offense, and therefore any testimony that the Master might be expected to give regarding the incident would be of dubious relevance and admissibility. The Investigating Officer also knew that the Master was scheduled to sail almost immediately and that requiring him to appear at the hearing would disrupt that schedule. Appellant was therefore asked to explain the relevance of and need for the Master's testimony. Appellant did not make any such explanation prior to the hearing.

With regard to the issuance of subpoenas prior to suspension and revocation proceedings, 46 CFR 5.15-10(a) provides, in pertinent part: "During the investigation and prior to hearing, the investigating officer shall issue subpoenas for the attendance of witnesses or for the production of...any other relevant evidence ... that may be needed by the person charged." (Emphasis added.) Under the circumstances of the instant case, where neither "relevance" nor "need" had been shown, I find that the Investigating Officer's failure to command the Master's appearance at the first hearing session was not unreasonable, and was not unfairly prejudicial to Appellant.

The Investigating Officer's case, which was completed at the first hearing session, consisted of the testimony of the alleged victim and several eyewitnesses, not the Master's. Appellant's argument that he was denied the right to "confront his accuser" (referring to the Master) is therefore misdirected.

Finally, it is noted that after the Investigating Officer rested his case at the hearing, Appellant requested that the hearing be continued, and renewed his request that the Master of EAGLE LEADER be subpoenaed as a witness. Counsel for Appellant

informed the Administrative Law Judge that he wished to call the Master as a " hostile witness" for the purpose of impeaching the government's witness. The Administrative Law Judge granted Appellant's request and a subpoena was issued. The hearing was then continued until 7 November 1977, when the Master of EAGLE LEADER appeared as a witness and was thoroughly examined by counsel for Appellant.

From all that appears in the record, I conclude that Appellant was afforded a fair hearing, with full opportunity to confront and cross-examine any adverse witnesses as well as to present evidence on his own behalf.

Appellant's second contention on appeal is that the decision of the Administrative Law Judge was contrary to the evidence. The evidence produced at the hearing, and relied upon by the Administrative Law Judge in his decision, consisted essentially of eyewitness testimony. On appeal, Appellant points to a number of discrepancies in the testimony of the government's witnesses, and vigorously argues that their testimony is not credible. Several discrepancies do appear in the testimony of the various witnesses, but those discrepancies are very minor in nature and are not essential to the disposition reached in this case. Indeed, in his decision the Administrative Law Judge relied primarily on the testimony of Appellant himself, even though Appellant's version of the facts differed substantially from those of other witnesses. Still, it was undisputed that Appellant forcibly placed his hands on McDuff and shook him "to the extent that McDuff's head made contact with the ship's bulkhead several times." Thus, there was substantial evidence of assault and battery presented at the hearing.

To rebut the showing made by this evidence, Appellant urged in his own testimony that he was acting in self defense, stating that he was "aware" of McDuff's "reputation for carrying a knife."

The details of Appellant's claim of self defense can best be examined by reviewing his last statements made during direct examination at the hearing. (Tr. 159:)

Q: Did you have any chance at that time, to just walk away from him? Just before you grabbed his lapels?

A: I did walk away from him and went into the recreation room, and he came behind me. He was still shouting and
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Q: Did you think at that time he might hit you or harm you?

A: Well, I didn't think so much about him hitting me, but as I say, I'm thinking he might, you know -- you never know what a nut is going to do.

Q: And did he have a reputation, as you testified here, of carrying a knife?

A: Sure.

COUNSEL: I have no further questions.

The Administrative Law Judge flatly rejected Appellant's claim of self defense by finding: "There is no evidence in the record to indicate that there was any need to restrain Mr McDuff, nor do the facts establish that Mr. Levy was in any danger, nor that Mr. Levy was in fear of his own safety." (D-11.) It is important to note at this point that the testimony of all other eyewitnesses in this case was substantially to the effect that Appellant was not acting in self defense, but, rather, that he was the aggressor.

The findings of the Administrative Law Judge with respect to the weight and credibility of testimonial evidence are to be accorded great weight. Such findings are peculiarly within the realm of the Administrative Law Judge's discretion and will be altered on appeal only upon a showing that he acted arbitrarily or capriciously. Decision on Appeal No. 1960. (SEEHORN). There being substantial evidence in the record of a reliable and probative nature in support of the Administrative Law Judge's findings and conclusions, I am unable to find that his actions were either arbitrary or capricious.

ORDER

The order of the Administrative Law Judge dated at Texas, on 9 December 1977, is AFFIRMED.

R.H. SCARBOROUGH
Vice Admiral, U.S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C., this 30th day of January 1979.

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